EMPLOYMENT TRIBUNALS
PUBLIC PRELIMINARY HEARING

Claimant: **Mrs Z Spence**

Respondents: UK Direct Business Solutions Limited

Heard at: Newcastle Hearing Centre (by video) On: 8 June and 28 November 2023

Before: Employment Judge Morris (sitting alone)

Representation:
Claimant: In person Respondent: Ms O-F Dobbie of counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is as follows:

1. The Tribunal is satisfied that the claimant's claim of direct sex discrimination has no reasonable prospect of success and, as such, that claim is struck out.

2. The claimant may not pursue a complaint of indirect sex discrimination.

3. The Tribunal is satisfied that the claimant's monetary claims in respect of nonpayment of bonus and non-payment of commission have no reasonable prospect of success and, as such, those claims are struck out.

4. The Tribunal is not satisfied that it can be said that the remainder of the claimant's claims should be struck out on the basis that they have no reasonable prospect of success, for non-compliance with …. an order of the Tribunal or that they have not been actively pursued (as the case may be) and, as such, the respondent's application to strike out each of those claims is refused.

REASONS

This public preliminary hearing

1. This public preliminary hearing was conducted in two principal parts. The first was on 8 June 2023. Briefly put, it addressed the respondent's application that the Tribunal should consider striking out or making deposit orders in relation to the claimant's claims. The second part took place on 28 November 2023.
   The focus of that hearing was primarily on the claimant's application to be permitted to amend her claim.

2. In accordance with Rule 1(3) of the Employment Tribunals Rules of Procedure 2013 ("the Rules") the decision of this Tribunal regarding the respondent's strike-out application is a judgment, which must be registered, whereas its decision regarding the respondent's application for a deposit order is obviously an Order. These Reasons therefore relate primarily to that Judgment as to the strike-out application even though the separation of the two decisions is somewhat artificial given that, despite the different thresholds, similar principles apply to any consideration of whether all or part of a claim should be struck out under rule 37 of the Rules on the basis that there is "no reasonable prospect of success" or whether a deposit order should be made under rule 39 on the basis that an allegation "has little reasonable prospect of success".

3. Thus, in the section of these Reasons headed "Consideration" I address, principally, the respondent's application that the claimant's claim should be struck out. My consideration of, first, the respondent's application that deposit orders should be made and, secondly, the claimant's application that she be permitted to amend her claim is set out in the Reasons accompanying the Orders I have made in this case ("the Related Orders"), which have been sent to the parties at the same time as this Judgment. It is, however, impracticable to separate completely my consideration of the above three applications and, therefore, this Judgment and the Related Orders must be read together.

4. Furthermore, as I regard this Judgment as being the principal document I have included in it matters that might be considered as primarily relating to the respondent's application for deposit orders and/or the claimant's application to amend her claim; for example, the submissions made at both parts of this hearing and the evidence that the claimant gave at the second part of the hearing, which although primarily relating to the amendment application contained elements that are relevant to the respondent's strike-out application.

Representation and evidence

5. At both parts of this hearing the claimant appeared in person and the respondent was represented by Ms O-F Dobbie of counsel.

6. Both parts of the hearing had been listed to be conducted by way of the Cloud

Video Platform but at the first part the claimant experienced difficulties in this respect, which could not be overcome. As such, by consent, she participated in that first part of the hearing by telephone.

7. At the first part of the hearing no oral evidence was given to the Tribunal, the parties relying instead upon submissions made by Ms Dobbie and the claimant during the course of which they both made reference to separate bundles of documents that each of them had produced. At the second part of the hearing the claimant gave oral evidence, particularly in the form of answering questions asked of her by Ms Dobbie, and she and the claimant again made submissions.

8. At the first part of the hearing the Tribunal had before it two bundles of documents that had been produced by the claimant and on behalf of the respondent. The numbers shown below as (x) are the page numbers in the respondent's bundle; the numbers shown below as {x} are the page numbers in the claimant's bundle. In preparation for the second part of the hearing the respondent produced a further bundle of documents. The numbers shown below as [x] are the page numbers in that second bundle.

Context

9. This case had previously been considered at a private preliminary hearing held on 31 March 2023 ("the March Hearing") at which the claimant's case was identified and summarised and various orders were made ("the March Orders"). One of those orders related to the fixing of a further private preliminary hearing, it being noted that if the respondent were to make any applications for strike-out or deposit orders, application would be made to convert that hearing to a public preliminary hearing. Additionally, the claimant was required to provide certain specific further information in relation to her claims by 16 May 2023.

10. The claimant did not initially comply with those orders but, having been prompted to do so by the respondent's solicitors, she wrote to the Tribunal early on 2 June 2023 explaining and apologising for the delay. She attached certain documents to her email including two documents that she referred to as a "Timeline" {64} (a redacted version being at [77] and a "Grievance Response" {57}.

11. By email dated 31 May 2023 the respondent applied to convert the private preliminary hearing that had been listed to a public preliminary hearing to consider, amongst other things, whether any of the claimant's claims should be struck out and whether a deposit order should be made to enable any of the remaining claims to continue.

12. During the first part of this hearing it was noted that in her Timeline document the claimant had set out details of alleged incidents to which she had not made reference in her claim form (ET1). In particular, there were allegations or sexual harassment the first of which was said to have occurred in June 2021 As such, in a letter from the Tribunal that I had caused be written dated 2023 [94], I directed that if the claimant wished to rely on such matters she would need to apply to amend her claim, which she did under cover of an email dated 4 July

2023 [97] to which she attached, first, an amended claim form [101] (in which further information was given in boxes 8.2 and 15) and, secondly, a further untitled document, which in the bundle prepared for the second part of this hearing the respondent has referred to as, "Claimants Chronology" [116]. As I read it, however, it is more than a chronology and provides further information that was required of the claimant in the March Orders and in the Tribunal's letter of 21 June 2023. The respondent replied to the application to amend under cover of an email dated 19 July 2023 [122].

The claimant's evidence

13. As noted above, at the second part of this hearing the claimant gave oral evidence particularly in the form of answering questions asked of her by Ms Dobbie. That evidence included the following:

    13.1 The first inappropriate comment that she had recorded in her Timeline document was made to her in June 2021. She was aware at that time that she could complain about sexual harassment. In September 2021 she had exchanged text messages with her fiancé who had told her that she could go to an employment solicitor and had advised her that she "could get thousands of pounds in a pay-out" {71}. Nevertheless, she had not researched her legal rights at that point. The principal reason for this is that she had received a joining fee from the respondent, which she would have to repay if she terminated her employment within one year of it commencing. Additionally, due to the awful culture in the workplace she had had something of a breakdown over Christmas; albeit she had not sought medical advice.

    13.2 In April 2022 the claimant had raised with her manager a concern about a member of her team having sent her an inappropriate Whatsapp message. She asked her manager to keep her concern to himself, which he had agreed to do but he had then informed others. This had caused the claimant to file a grievance against her manager as he had broken her confidence. She had articulated her concerns to her fiancé in a message dated 15 June 2022 {72} in which she stated "I am very seriously considering making an official complaint on the basis of sexual and gender discrimination claim based on the following instances", which she set out. Once again, however, she did not research her rights at this stage.

    13.3 By 2 August 2022 (the date of a redundancy consultation outcome meeting) the claimant had obtained some legal advice {32} and at the end of that meeting she informed the consultation manager, "I will pursue this legally" {34}. The claimant confirmed in evidence that at this time it was her intention to bring claims against the respondent.

    13.4 The claimant spoke to ACAS on 3 August 2022 when she was informed of the three-month time limit for presenting claims to the Employment Tribunal.

13.5 The claimant had first made contact with a solicitor on 2 August 2022. In an email dated 4 August 2022, she informed the respondent that she had "sought legal advice" {41}. In that email the claimant also requested from the respondent copies of documents and other information, which she had been advised to request.

13.6 Towards the end of August 2022, the solicitor had provided an estimate of legal fees, which the claimant ultimately decided she could not afford. That solicitor therefore referred the claimant to a 'no win, no fee' solicitor.

13.7 Discussions regarding a possible settlement having come to naught, the claimant decided to litigate and commenced Early Conciliation on 26 August 2022 [29]. When doing so, she was reminded of the threemonth time limit. The Early Conciliation certificate was then issued on 6 October 2022.

13.8 The claimant did not immediately do anything but, in mid-October, saw the second solicitor. Following what the claimant has referred to as being "several meetings and risk assessments" that second solicitor advised her on 6 December 2022 that, "they could not provide legal counsel due to the risk posed by time limit constraints" [97]. The claimant confirmed in evidence that that second solicitor, first, had never guaranteed that he or she would represent the claimant and, secondly, had informed her of the time limits on 31 October 2022.

13.9 The claimant explained that at this time she had married and had been on honeymoon from which she had returned on 5 December 2022. The following day, 6 December 2022, she had received a telephone call from the second solicitor informing her that as, recorded above, they would not represent her. That same day, 6 December, the claimant had presented her claim form to the Tribunal. The claimant confirmed that she accepted that this indicated that she was capable of presenting a claim, which she said anyone could do, but that she wanted to secure the best chance of success.

13.10 In box 15 of her claim form the claimant had referred to having been "subjected to sexual discrimination and sexual harassment, the last instance on 14.06.2022", adding, "although I am aware the timeframe has surpassed for a separate claim regarding this" [41]. She stated, however, that although she knew the incident regarding the shirt-dress, which had occurred on 14 June 2022, was out of time she had written in box 8.2 of her claim form, "I believe I was made redundant as I started to protest vocally against ongoing sexual harassment and discrimination which i was a victim to frequently during my employment at The Company" [36].

13.11 The claimant commenced new employment on 30 August 2020, which would have been within her due notice from the respondent.

13.12 The claimant accepted that at neither the March Hearing nor at the first part of this preliminary hearing had she applied to amend her claim. She explained that the reason for that was that she thought that her claim was potentially in timeframe. Further, she accepted that most of the content of her application to amend is included in the grievance that she had submitted in late August 2022. She explained in evidence that she had not thought to ‘cut and paste’ the content of that grievance into her claim form until the respondent’s solicitors had suggested it months later. She repeated that she had returned from honeymoon on 5 December 2022, received the telephone call from the second solicitor on 6 December 2022 and knew that she had to act quickly.

Submissions

14. Ms Dobbie and the claimant made oral submissions at both parts of this hearing; in the former case, at the first part of this hearing, by reference to a detailed skeleton argument running to some 16 pages in which were set out the background, the relevant law and outline submissions, and at the second part of this hearing relying upon the respondent’s reply to the claimant’s application to amend [122]. In both that skeleton argument and that reply Ms Dobbie referred to and quoted from case law that is relevant to these proceedings, all of which I brought into account in reaching my decision. I need not set out full details of the submissions made by or on behalf of the respective parties here because they are a matter of record and the salient points will be obvious from my findings and conclusions below. Suffice it to say that I fully considered all the submissions made in the context of relevant statutory and caselaw, and the parties can be assured that all submissions were taken into account in coming to my decision.

15. That said, the key points made by Ms Dobbie on behalf of the respondent included as follows:

At the first part of this hearing

15.1 A complaint of direct discrimination requires the comparator to not have the relevant protected characteristic whereas in relation to her complaint of direct sex discrimination, the claimant relied upon a female comparator. Her claim was therefore misconceived and should be struck out.

15.2 The claim of harassment related to sex arose from the single act of the claimant being sent home on 15 June 2022 for wearing a shirt-dress. That claim was out of time by approximately 6 weeks and the Tribunal does not have jurisdiction to hear it unless the claimant persuades the Tribunal to extend time, the onus being on her. In any event this claim has no or little reasonable prospect of success as the claimant’s dress was not compliant with the dress code, which applies equally to men and

women, and there is nothing to suggest that the request to comply with the code was related to sex.

15.3 As to the complaint of sexual harassment, the Timeline that the claimant has recently presented strays well beyond the facts articulated in the claim and extends far beyond the claims in the claim form. There is therefore no sexual harassment claim to strike out or to consider time limits in respect of. If the claimant wants to advance such claims she will have to apply to amend her claim out of time. The claimant has not advanced evidence or facts on an extension of time. Any application would have to be considered in accordance with the decision in Selkent. The claimant knew of the incidents at the time rather than this being a late discovery of facts. She had a text message exchange with her partner, which indicates that he referred to the claimant going to an employment solicitor {71} and that she was considering a complaint of sexual and gender discrimination {72}. Also, no later than 3 August 2022, claimant was aware of her situation and in her email of 4 August she refers to having sought legal advice. She had not gone to ACAS until 26 August 2022 but then waited 2 months to submit a claim.

15.4 The above notwithstanding, there are only 3 allegations of sexual harassment listed in the Timeline, which are said to have occurred in June 2021, on 10 December 2021 and in March 2022. As such, they are (by reference to the date on which the claim form was presented) out of time by between 6 weeks and approximately 13 months and (by reference to now) by anything from approximately 11 months to 2 years.

15.5 If an amendment is allowed and time extended, application is made to strike out the claim due to the claimant's unreasonable breaches of orders. Alternatively, if the Tribunal accepts there was a breach but considers strike-out too severe a sanction, the respondent seeks the costs of and occasioned by the amendment and breaches to be assessed later.

15.6 There are no particulars of claim or facts articulated in the claim form which could be construed as a claim for indirect sex discrimination. The PCP identified by the claimant is a requirement to comply with the respondent's dress code but there is nothing within it that is liable to particularly disadvantage women. The claim should be struck out because it is not pleaded, it is out of time, it has no reasonable prospects of success and the claimant is in breach of an order requiring her to specify the way in which the dress code is discriminatory.

15.7 The claimant's monetary claims should be struck out because bonuses and commission payments are discretionary and will be withheld if the claimant is dismissed for any reason; the respondent is entitled to terminate the claimant's employment by making a payment in lieu of notice, which is based upon basic pay only to the exclusion of any bonus or commission payments. Thus the sums sought are not contractually

due or otherwise "properly payable". Further, the claimant has failed to comply with the order to provide the names of those whom she is said to referred for employment, and she has not actively pursued this claim.

15.8 The respondent seeks deposits in respect of the victimisation claim on the basis that, for the reasons given, the claimant's argument that her redundancy was decided upon because of any protected act have little reasonable prospects of success.

At the second part of this hearing

15.9 The last act of sexual harassment upon which the claimant relies is that relating to her wearing a shirt-dress to work on 15 June 2022. That was not sexual harassment but even if it were it was long out of time: six weeks before the claim and the application to amend was a good bit later. Further, the claimant accepts in her claim form that "the timeframe has surpassed for a separate claim regarding this."

15.10 The particulars in the claimant's Timeline stray outside the scope of the claims in the ET1. The nature of the matters the claimant wants to add are set out in the Timeline:

15.10.1 A suggestion by another employee during June 2021 that they should "run away with each other and have loads of sex".

15.10.2 The claimant being asked on 10 December 2021, "when was the last time you were spit roasted?"

15.10.3 From the end of November until mid-December 2021 a different employee repeatedly making derogatory remarks targeting the claimant, "specifically mentioning anal rape in the office".

15.10.4 In March 2022 a third employee loudly shouting, "Zoe, give me a blowy" and questioning whether she was involved in a sexual relationship with an employee with whom she was in conversation at the time.

15.10.5 On 15 June 2022 the claimant being sent home from work after being informed by an HR manager that a conversation had been overheard by the men on the sales-floor regarding the white shirt-dress that she was wearing, which it had been decided was inappropriate in the office and she needed to change it.

15.11 All the above matters are new and apart from the shirt-dress incident are not in the ET1; and an allegation of sexual harassment is not in the ET1. Accordingly this is not a relabelling of existing facts or an addition of detriments to a claim already pleaded. It is entirely new both in the type of claim (sexual harassment) and in terms of the facts relied on. It should not be easier to get an out of time claim into the proceedings in an amendment than in the claim form.

15.12 In the above circumstances, a strict application of the time limits applies and it is for the claimant to persuade the Tribunal as to any extension. Given that the allegations were first advanced as an application to amend on 4 July 2023, they are out of time by between 11 months and almost 2 years.

15.13 From the claimant's evidence it is clear that she was fully aware of the facts during the period June 2021 to June 2022 (this is not a case of late discovery) and she was aware that she had a right to claim as is evident from the text messages with her fiancé. Further, from May 2022 there was no financial disincentive in her making a claim.

15.14 The claimant was aware of the three-month time no later than 3 August 2022. Had she acted promptly in commencing Early Conciliation and presenting a claim, various of the claims relied on as sexual harassment would have been in time; and she must have had litigation in mind when she started Early Conciliation and stated in an email to the respondent of 11 October 2022, "I look forward to discussing this further at the tribunal". Additionally, she had advice in August and October 2022. She had all the information she needed by early August and was aware that she was at risk of being out of time yet she knowingly let the time limit pass.

15.15 The claimant cannot argue that she had to exhaust the respondent's internal grievance process as the Early Conciliation certificate was issued on 6 October and the grievance outcome was on 10 October. She thus had one month extension and needed to present her claim by 5 November 2022. Instead the claimant delayed by almost 2 more months following receipt of the Early Conciliation certificate and the grievance outcome.

15.16 The claimant's evidence was that she had made a positive choice to prioritise her wedding and honeymoon. She let the solicitors have responsibility for progressing her claim although she knew it was not guaranteed that they would represent her; and she knew as 5 November approached that the solicitors had not presented the claim.

15.17 Thereafter, the claimant was perfectly capable of presenting her claim and did so the same day that the solicitors informed her that they would not be representing her. She is computer literate, well able to research her rights and is intelligent enough and capable of presenting her claim. She had already articulated matters in her written grievance of 25 August 2022, which could easily have been 'cut and pasted' into a claim form. When she did present her claim she expressly decided not to pursue sexual harassment until, after the preliminary hearings, she applied to amend her claim in July 2023.

15.18 If the application to amend is permitted, there will be real prejudice to the respondent including as follows:

15.18.1 It will have to produce a more detailed amended reply.

15.18.2 There will be need for yet further case management. A significantly increased number of witnesses will be required, which will increase disclosure and the size of the bundle.

15.18.3 There will be increased delay for all parties.

15.18.4 The hearing will be far longer.

15.19 Further, witnesses' memories are likely to have faded and various people have left the respondent's employment including the three principal protagonists referred to in the allegations set out at paragraph 15.10 above.

15.20 The above matters will also create problems for the Tribunal, other cases seeking listings in the Tribunal and the claimant, including that she would be at a greater costs risks. She already has access to declarations of discrimination, victimisation and sex harassment and damages for injury to feelings by reason of the claims that are already pleaded and stands to gain little in real terms by adding the new claims.

15.21 In closing her submissions Ms Dobbie briefly revisited and updated where necessary the submissions that she had made at the first part of this hearing. In particular, the claimant now having particularised the basis of her complaint of indirect sex discrimination [120], it was clear that that complaint was misconceived. The claimant was not saying that the respondent's dress code policy places women at a disadvantage or that women find it difficult comply with it; and, in saying that "she was treated less favourably", she uses direct sex discrimination language. Such a complaint of direct sex discrimination or harassment related to sex is out of time in any event.

16. The key points made by the claimant included as follows:

At the first part of this hearing

16.1 I appreciate that some of the incidents in the Timeline are out of limit for the majority of claims and that I did not respond to the previous orders of the Tribunal but they provide a background of my time with the respondent and what the working environment was, particularly for a woman. Looking back in hindsight was extremely traumatic. I relived the instances again, which affected my relationship with my husband, me at work and my sleep. The respondent may say that 50% of its workforce was laid off but I want to show that that was not true. While working there I suffered a lot of instances of stress of which I will provide medical evidence. This affected why the orders were not complied with properly.

16.2 As to direct discrimination I understand that lawfully I should not compare myself with a woman and cannot say that she was treated differently but she was still in her probationary period, had worked there less than me, she received a pay rise and I outperformed her in every month except June. I appreciate that I cannot say it was discrimination but I do believe that it was because of what I said about starting a family. I was made redundant at the start of August and on 20 September two men started to sell water contracts.

16.3 The respondent said that my dress was see-through but it was not (it is double lined) and that my bra could be seen but it is actually part of the garment. I had a slip underneath so you can't see my underwear and it is longer than my underwear – a couple of inches below the knee. I believe that I adhered to the policy (see paragraph 1.2). I had bad eczema so to cover my legs was uncomfortable. I was wearing “business casual attire” referred to in paragraph 2.5. I was told on 15 June that a conversation had been overheard between men regarding my outfit and because of that I was told to go home and change I responded that if the men were talking that was a matter of culture and explained my position to HR. Nevertheless I had to go home. I was very upset. I was subject to sexual harassment. When I went to HR nothing was done. When I returned to work wearing leggings I asked my manager who had said what and I was told to drop it. I said no, asked why and that it was double standards and I wanted equality but I was laughed at. Then HR said that there had been miscommunication and nothing had been said on the floor.

16.4 I also had discussion with CB because I was not happy with the notes of the redundancy consultation {35}. There had been a number of instances of sexual harassment, which I communicated with HR. It was clear that I had been made redundant because of the complaints of sexual harassment {33}. CB said that he remembered the incident with the reference to “blowy” and asked if the employee who made the comment had apologised to me {33} – but no action was taken.

16.5 At the start of my time with the respondent I went to HR a lot (see, for example, the June 2021 paragraph of my Timeline) but nothing was done as it was so very much in the culture of the respondent. In my grievance I mentioned sexual harassment {24} and at the redundancy meeting I mentioned incidents of sexual harassment including the anal rape joke and spit-roasting comments {32}, which CB advised was not acceptable and would be dealt with through the disciplinary process {33}. So there was a very consistent narrative whether or not out of timelines. It went on with a number of females. Going through this is stressful and upsetting. It might be out of time but it is not okay.

16.6 Given the severity of the allegations and the fact that I am representing myself I hope it will be accepted that I am not out of time and it would be unjust to strike out my claims. In respect of the overall issue I believe I was made redundant because of the ongoing issues relating to sexual

harassment. As I signed off my claim form, “I strongly believe I was selected for redundancy due to victimisation and my final pay was unfairly adjusted by £2,500”.

16.7 I believe I was promoted because I raised a grievance. I did not receive a new contract of employment. Nothing changed at all: pay; benefits; role – although the respondent says that I got new responsibilities I was already doing them. Also, I did not sign any new paperwork.

16.8 I apologise for having breached the previous Tribunal orders. I have done myself a disservice.

16.9 In the redundancy consultation meeting {30} my role was wrongly described as “Business Service Consultant”. The respondent says that I cannot claim victimisation because I was offered two job roles but I wasn’t – I had to apply {30}.

16.10 I submitted my claim form 2 months after going to ACAS because I was trying to get legal aid through a re-mortgage or a no win no fee solicitor. I was married on 1 December 2022 and did not return from honeymoon until 5 December, and the papers were submitted to the Tribunal on the 6 December 2022.

At the second part of this hearing

16.11 She is not educated and lacked knowledge and understanding of the timeframe.

16.12 Referring to my application to amend of 4 July, Ms Dobbie had referred to “alleged” instances but in the redundancy consultation those instances were acknowledged by the respondent and its head of HR at the time: the comment “run away with each other and have loads of sex”, which he confirmed was “on record” {32}; the references to anal rape and spit-roasting {32}; the remark, “Zoe, give me a blowy”, which the head of HR confirmed he remembered, and the name of the employee in question {33}.

16.13 Ms Dobbie had referenced my marriage and honeymoon but I work fulltime too, and I am now pregnant.

16.14 The timeframe was missed but I hoped to get legal advice; maybe I was naïve.

16.15 Ms Dobbie had said that I was intelligent enough submit a claim. I may be able to write a couple of sentences and tried my best to articulate matters but I lack knowledge (as is evident from the spelling mistakes in the claim form) and my communication is not the best because I am not educated for it.

16.16 In the commission plan [90] the Annual Quantity Amount is defined as being "the total annual energy consumption by a customer" but I was not an energy consultant – I was employed to deal with water enquiries and arrange water contracts. So this commission plan is not mine.

16.17 Also, in the redundancy policy {43}, which I did not receive until after I had been made redundant, it is stated that payments and benefits will continue as normal. I therefore believe I should receive payment in respect of commission and 'refer a friend'. This was confirmed in my termination letter of 3 August 2022, "You will receive your pay and benefits up to date in the normal way" {38}. I had already earned these payments and they were due to be paid with my net pay so I believe that I am entitled to them.

16.18 As to the shirt-dress incident, I believe I was treated less favourably. This was ongoing harassment; probably specifically for me because I was wearing it for my eczema. It was only a few inches above the knee. I was told that the conversation had been overheard by men and I needed to change. If it was not for the past problems I would try to explain. I was objectified in the workplace. When I spoke to my manager I said that there were double standards, particularly in respect of what had previously been explained. Contrary to what is recorded in the grievance outcome, it was not just below my underwear and, being double lined, it was not see-through.

16.19 Section 13 of my contract of employment provides that no variation will be effective unless it is in writing and signed by the parties {22}. Seven weeks before I was made redundant I was given a new job title but no extra money or new duties. Nothing was signed to vary my contract. A letter from HR stated that everything stood except for the job title and at my grievance hearing I was told that I did not need a new contract. I was made redundant less than six months after I raised a grievance.

The law

17. The provisions of the Employment Tribunals Rules of Procedure 2013 that are applicable to the respondent's strike-out application are as follows:

37. — Striking out

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

> *(c) for non-compliance with any of these Rules or with an order of the Tribunal;*
>
> *(d) that it has not been actively pursued;*
>
> *(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).*
>
> *(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.*
>
> *(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.*

Consideration

18. As recorded above, the parties' applications in these proceedings are, on behalf of the respondent, that orders should be made in respect of either striking out or deposit and, on behalf of the claimant, that she should be permitted to amend her claim. As noted above, though applications were primarily considered in turn at, respectively, the first part of this hearing and the second part of this hearing. For the reasons explained above, in this section of these Reasons I principally address the respondent's application that the Tribunal should consider striking out all or part of the claimant's claims.

19. I first set out some general considerations particularly as to the guidance that I draw from some of the leading authorities in this area of the law before turning to address the respondent's applications by reference of the claimant's claims.

20. In accordance with the guidance given in the decision in Balls v Downham Market High School and College [2011] IRLR 217, I have given careful consideration to all the relevant material before the Tribunal. Notwithstanding the fact that, in the pursuit of some conciseness, every aspect might not be specifically mentioned below. I have thus had regard to the claimant's claim form and the respondent's response; the further particulars provided by the claimant in the form of her "Timeline" following the orders made at the March Hearing; the submissions made at this hearing; the relevant statutory and case law.

General principles

21. In relation to any assessment of whether a claim either has no reasonable prospect of success or little reasonable prospect of success, general principles in relation to a complaint of discrimination are relevant considerations. One such general principle is the shifting of the burden of proof provided for in section 136(2) of the Equality Act 2010 (the "2010 Act"), which states, "If there are facts from which the court could decide, in the absence of any other explanation that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred." It is well-established (e.g. Igen Ltd

v Wong [2005] ICR 931) that this involves a two-stage approach. At the first stage the claimant is required to prove, on the balance of probabilities, facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. Thus the tribunal is required to make an assumption at this stage which may be contrary to reality. This first stage has been explained as the claimant establishing what has been referred to as a 'prima facie case of discrimination'. Although the burden of proof is on the claimant at this stage and the standard of proof is the usual civil standard of balance of probabilities, the threshold of "could" decide/conclude is not particularly high: Madarassy v Nomura International plc [2007] ICR 867.

22. Within the above general principle there is a second, which is also referred to in Igen Ltd, that at this first stage it is appropriate for the tribunal to draw inferences from primary facts and, in doing so, must assume that there is no adequate explanation for those facts. I bring these general principles of the reverse burden of proof and the drawing of inferences into account in my consideration of whether the claim of this claimant has either no reasonable prospect or little reasonable prospect of success.

23. A third general principle can be drawn from the decision in HM Prison Service v Dolby [2003] IRLR 694, EAT being that a two-stage test applies in respect of a respondent's application for a strike-out order: first, do any of the grounds contained in rule 37(1)(a) to (e) of the Rules apply (e.g. does the claim have no reasonable prospect of success) and, if so, secondly, does the tribunal in the exercise of its discretion consider it appropriate to strike out the claim?

Strike out – no reasonable prospects of success

24. In the case of Mbusia v Cygnet Healthcare Limited EAT 0119/18 the EAT noted that strike-out is a Draconian step that should be taken only in exceptional cases and that particular caution should be exercised in cases badly pleaded, for example by a litigant in person. Further guidance has been given in the case of Cox v Adecco UKEAT/0339/19 in which the EAT said that if the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike-out will be appropriate. It was also said in that case that the claim should not be ascertained by only requiring the claimant to explain it while under the stress of a hearing and that reasonable care must be taken to read the pleadings and any key documents in which the claimant sets out the case. The careful reading of the documents may show that there is a claim, even if it might require amendment.

25. In relation to the issue of striking out a claim of discrimination on the ground of no reasonable prospect of success, the House of Lords in Anyanwu v South Bank Students Union [2001] ICR 391, HL highlighted the importance of not striking out discrimination claims thus:

> *"….. vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally*

fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."

"discrimination issues … should, as a general rule, be decided only after hearing the evidence" and (relevant to the case before me) that it would be illogical to require an employment judge to have a different approach depending on whether he or she is considering striking out or making an order for a deposit as either order is, on any view, a serious, and potentially fatal, course of action."

26. This general approach has been consistently followed and it is generally accepted that strike-out on this ground should only be exercised in exceptional or rare circumstances. In Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330, for example, the Court of Appeal stressed that it will only be in an exceptional case that a claim will be struck out as having no reasonable prospect of success where the central facts are in dispute:

"*It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the employment tribunal to decide otherwise. In essence that is what Elias J held. I do not consider that he put an unwarranted gloss on the words 'no reasonable prospect of success'. It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level.*"

27. More particularly, in the decision in Balls, Lady Smith stated as follows:

"…. *the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects.*"

28. Similarly, in Tayside Public Transport Company Ltd (T/a Travel Dundee) v Reilly [2012] IRLR 755 the Court Session stated:

"*Counsel are agreed that the power conferred by rule 18(7)(b) may be exercised only in rare circumstances. It has been described as draconian (Balls v Downham Market High School and College [2011] IRLR 217,*

para 4 (EAT)). In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the tribunal to conduct an impromptu trial of the facts (ED & F Man Liquid Products Ltd v Patel [2003] CP Rep 51, Potter LJ, at para 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (ED & F Man … ; Ezsias …). But in the normal case where there is a 'crucial core of disputed facts', it is an error of law for the tribunal to pre-empt the determination of a full hearing by striking out (Ezsias … Maurice Kay LJ, at para 29)."

29. Having reviewed the above authorities, Mitting J in Mechkarov v Citibank NA [2016] ICR 1121 set out the approach that should be taken in a strike-out application in a discrimination case as follows:

"(1) only in the clearest case should a discrimination claim be struck out;
(2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;
(3) the claimant's case must ordinarily be taken at its highest;
(4) if the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and
(5) a tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

30. Notwithstanding the caution expressed in the caselaw above in respect of striking out a discrimination claim, I remind myself of the guidance in Jaffrey v Department of Environment Transport and Regions [2002] IRLR 688, that this does not impose a fetter on a tribunal's discretion to do so in appropriate circumstances. A similar point is made in the decision in Chandhok v Tirkey [2015] IRLR 195 in which mention is made of it being rare for a strikeout application to succeed before the full facts of the case have been established in evidence but, "This stops short of a blanket ban on strike-out applications succeeding in discrimination claims. There may still be occasions when a claim can properly be struck out – where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; or where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic …" (Madarassy).

31. Similarly, in Ahir v British Airways Plc [2017] EWCA Civ 1392 it was said that employment tribunals should not be deterred from striking out claims including discrimination claims, which involve a dispute of fact, "if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context". I note, however, that

in that case the Court of Appeal added that, “the hurdle is high”. A further factor arising from this decision in Ahir, which is relevant in the case before me, is that the claimant’s position is not speculative as she personally observed and heard things that were said and done to her.

32. On a different point it is well-established that the correct approach in relation to a strike-out application is to take the claimant’s case at its highest: see Silape v Cambridge University Hospitals NHS Foundation Trust EAT 0285/16 and Ukegheson v London Borough of Haringey [2017] EWCA Civ 1140.

The respondent’s applications

33. Against the background of the above general principles, I turn to consider the respondent’s application that the claimant’s claims be struck out. I do so by following the structure of Ms Dobbie’s outline submissions in her skeleton argument.

Direct sex discrimination

34. Section 23(1) of the 2010 Act provides that on a comparison of cases for the purposes of section 13 of that Act “there must be no material difference between the circumstances relating to each case”. The Explanatory Notes to that section explain, “The treatment of the claimant must be compared with that of an actual or a hypothetical person – the comparator – who does not share the same protected characteristic as the claimant …”.

35. In this case, in relation to her complaint of sex discrimination, the claimant compares herself with another woman. As the claimant is a woman it clearly cannot be said that that other woman, “does not share the same protected characteristic as the claimant”.

36. In making her submissions, the claimant accepted that and stated that she understood “that lawfully I should not compare myself with a woman and cannot say that she was treated differently”. She sought to draw comparisons such as the other woman being in her probationary period, having worked for the respondent for less time and having received a pay rise but none of those factors is relevant to the fundamental point in a complaint of direct discrimination that is based upon the protected characteristic of sex that the comparator must not share the same protected characteristic (i.e. be of the same sex) as the claimant. As the claimant conceded, “I appreciate that I cannot say it was discrimination”.

37. In these circumstances, I apply the two-stage approach in Dolby. First, I am satisfied that it can be said that this claim has “no” reasonable prospects of success (as was emphasised in Balls) and, therefore, that the grounds for strike-out contained in rule 37(a) of the Rules apply. That in itself is not determinative, however as I must then go on to consider whether I should exercise my discretion to strike out this claim, which includes a consideration of whether there are alternatives to striking out that might pursued such as the making of a deposit order. Having considered everything that is before me in

terms of both documents and submissions and reminded myself of the guidance that I draw from the decisions of the higher courts some of which is summarised above, I am satisfied that this is one of the "exceptional" cases referred to in much of the caselaw that I have set out above. Even taking the claimant's case at its highest I am satisfied that this claim can be said to be "the clearest case" such that the claimant's complaint of direct discrimination should be struck out: Mechkarov.

38. As such, I strike out that part of the claimant's claim that she was subjected to direct sex discrimination.

Harassment related to sex

39. The claimant brings this claim under section 26(1) of the 2010 Act. As is recorded in the March Orders she relies on the single event of her wearing a shirt-dress to work on 15 June 2022. She states that she was told that her dress had given rise to a conversation between a group of men on the salesfloor (although that explanation was later withdrawn) and that her dress did not comply with the respondent's dress code in consequence of which she was sent home to change. The primary point taken by the respondent is that this claim is approximately 6 weeks out of time and that the Tribunal does not have jurisdiction to hear it unless claimant persuades the Tribunal to extend time.

40. I understand that submission but a determination of whether a claim is out time does not only involve a consideration of the primary time period of 3 months starting with the act to which the complaint relates under section 123(1)(a) of the 2010 Act. That primary time period can be extended under section 123(1)(b) of the 2010 Act to "such other period as the employment tribunal thinks just and equitable". Furthermore, section 123(3) of the 2010 Act provides that "conduct extending over a period is to be treated as done at the end of the period"; that question of conduct extending over a period being considered by reference to whether there was an ongoing situation or a continuing state of affairs which were discriminatory: see, for example, Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530, CA and Aziz v First Division Association (FDA) [2010] EWCA Civ 304.

41. Those provisions therefore open up the prospect that this claim is not out of time. While that issue can be determined at a preliminary hearing, in the circumstances of this case I am satisfied that it would be better determined at the final hearing in light of the evidence presented to and the submissions made at that hearing.

42. A further point taken by the respondent in relation to this claim is that it has no reasonable or little reasonable prospect of success as the dress the claimant wore was not compliant with the respondent's dress code, which applies equally to men and women, and there is nothing to suggest that the request that the claimant comply with it was related to sex.

43. The claimant contends, first, that she believes that she did adhere to the dress code and, secondly, that although the incident upon which she relies occurred

on 15 June 2021, there was a background of previous incidents of sexual harassment in her place of work. Against that background she asserts that on 15 June she was informed by a member of the respondent's HR team that a conversation had been overheard on the sales-floor between a group of men discussing her outfit, which was a white shirt-dress, as a consequence of which she was required to go home and change her outfit. I find that it is at least arguable that if it is right, as the claimant asserts, that against the above background she was told that men were discussing her clothing that could meet the statutory definition of harassment contained in section 26(1) of the 2010 Act of unwanted conduct related to sex having the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

44. Given these opposing positions of the parties, in light of the caselaw guidance some of which I have set out above I am not satisfied that this claim is one of the exceptional cases in which it can be said that there are no reasonable prospects of success. On the contrary, applying the decision in Mechkarov, I am satisfied that there are core issues of fact that turn on oral evidence, which should be heard.
45. As such, I decline to strike out this claim of harassment related to sex and the respondent's application in that regard is refused.

Sexual harassment

46. This claim is brought under section 26(2) of the 2010 Act. The respondent relies upon two issues in this respect. The first is that the claim had not been pleaded and, if an application to amend were to be made, such claim would be out of time.

47. In this respect as is recorded above, in section 15 of her claim form the claimant had referred to having been "subjected to sexual discrimination and sexual harassment, the last instance on 14.06.2022". She also refers to "ongoing sexual harassment" in section 8.2 of her claim form.

48. In compliance with the March Orders, the claimant then provided further information in her Timeline document in which there are four clearly identifiable events that could meet the definition of harassment in section 26(2) of the 2010 Act. As recorded at paragraph 15.10 above, the first is said to have occurred in June 2021, the second on 10 December 2021, the third during the period from the end of November until mid-December 2021 and the fourth in March 2022. In addition, the claimant contends that the incident on 14 June 2022, when she was sent home to change her dress, also constituted sexual harassment.

49. As recorded above, the respondent contends that even if all the incidents were connected (which it disputes) the claims are out of time. In her claim form, having referred to having been subjected to sexual harassment, the claimant states, "although I am aware that the timeframe has surpassed for a separate claim regarding this", from which it can reasonably be inferred that she accepts that it is out of time. To an extent, the claimant's remarks in submissions that there was a very consistent narrative "whether or not out of timelines" and that it "might be out of time" further confirmed that she recognised this to be a case.

She submitted that due to the fact that she was representing herself she hoped it would be accepted that she was not out of time but being a litigant in person does not have any bearing on this question.

50. Notwithstanding the claimant's apparent recognition that this claim has been brought out of time, whether or not it has is a question that goes to the jurisdiction of the Tribunal and would have to be considered regardless of whether it had been raised by the respondent and regardless of any apparent concession by the claimant. Thus I return to the point made above that the primary time period of 3 months starting with the act to which the complaint relates under section 123(1)(a) of the 2010 Act can be extended under section 123(1)(b) of the 2010 Act to "such other period as the employment tribunal thinks just and equitable" and that section 123(3) of the 2010 Act provides that "conduct extending over a period is to be treated as done at the end of the period". I am once more satisfied that such a scene would be better determined at the final hearing in light of the evidence presented to and the submissions made at that hearing, in relation to which the claimant's submissions as to "the severity of the allegations" could have a bearing.

51. In the above circumstances, having considered everything that is before me in terms of both documents and submissions in the context of the relevant case law and having considered particularly the issue of whether the claim has been brought out of time, I decline to strike out this claim of sexual harassment on the basis that it has not been pleaded.

52. The respondent relies upon rules 37(1)(c) and (d) of the Rules for the second basis upon which it applies for an order striking out the claimant's claims: namely, that she has not complied with the orders of the Tribunal and/or the claim has not been actively pursued.

53. In respect of non-compliance, as recorded above, it is right that the claimant did not initially comply with the March Orders that she must provide certain specific further information in relation to her claims by 16 May 2023 and only did so when she was prompted by the respondent's solicitors. Even then, despite attaching her Timeline and a Grievance Response, she did not address all of the particular points that had been required of her in those orders.

54. It is therefore correct that the claimant has failed fully to comply strictly with the Tribunal orders to provide the specific further information by 16 May 2023 or, indeed, until she provided that information in her email of 7 July 2023 in compliance with the orders I had made. Be that as it may, the required information has now been provided and, as in all things, I must have regard to the overriding objective contained in rule 2 of the Rules of seeking to deal with cases fairly and justly and consider all relevant factors including the magnitude of the non-compliance; what disruption, unfairness or prejudice has been caused; whether a fair hearing will still be possible; whether some lesser remedy would be an appropriate response: see Weirs Valves and Controls (UK) Ltd v Armitage [2004] ICR 371, EAT and De Keyser Ltd v Wilson [2001] IRLR 324. It is also necessary to consider whether a strike-out is a proportionate response to the non-compliance: see, for example, Blockbuster Entertainment

Ltd v James [2006] IRLR 630, CA and Ridsill v D Smith and Nephew Medical EAT0704/05.

55. Having considered such matters (not least that I am satisfied that a fair hearing will still be possible), I am not satisfied that this claim of the claimant should be struck out on this basis

56. In respect of the claim not being actively pursued, I draw guidance from the decisions in Birkett v James [1978] AC 297, HL and Evans v Commissioner of Police of the Metropolis [1993] ICR 151, CA to the effect that a tribunal can strike out the claim where:

    56.1 there has been delay that is intentional or contumelious (disrespectful or abusive to the court), or

    56.2 there has been inordinate and inexcusable delay, which gives rise to a substantial risk that a fair hearing is impossible, or which is likely to cause serious prejudice to the respondent.

57. I also note that the facts in many of the decided cases in which reliance was placed on this ground or the ground of "want of prosecution" in the 2001 Rules of Procedure indicate a significant lack of activity on the part of the claimant such that prejudice to the respondent is apparent including, to quote Lord Justice Hoffman in Evans, having regard to the need "to investigate the facts before memories have faded, not to allow hurt feelings to fester and to provide as summary a remedy as possible". In this connection, while I accept that time has passed since the incidents in question I note that they were raised by the claimant in her grievance and the facts either were or should have been investigated at that time before memories had faded.

58. Having considered everything that had been put before me in these proceedings in light of the above caselaw guidance, I am not satisfied that any of the above circumstances applies in this case and, that being so, I decline to strike out this claim of the claimant on this basis.

59. In the alternative, again as recorded above, it was submitted on behalf of the respondent that the reasonable costs of and occasioned by the amendment and breaches should be awarded to the respondent "to be assessed later". I am satisfied that it is not only any assessment that should take place later. To the contrary, I am satisfied that any application in this regard should be made and considered at the final hearing rather than by me at this preliminary hearing.

General conclusions relating to the two complaints of harassment

60. By reference to the approach set out in Mechkarov referred to above, and adopting the numeration in that approach, my findings are as follows:

    (1) This case is not one that can be categorised as a "clearest case" warranting a decision that the complaints of harassment should be struck out.

(2) There are in this case "core issues of fact" that will turn to an extent on oral evidence, which should be heard.

(3) I have made my decision taking the claimant's case "at its highest".

(4) I am not satisfied that in this case the claimant's case has been "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents.

(5) In coming to my conclusions I have not conducted an impromptu mini-trial of oral evidence to resolve core disputed facts.

61. Applying the above and other relevant case precedents to the facts and circumstances before me, for the above reasons I am not satisfied, on any of the bases advanced by Ms Dobbie for the respondent's application that either of these two complaints of the claimant of harassment should be struck out. I refuse that application.

Indirect sex discrimination

62. At the first part of this hearing, Ms Dobbie submitted that there are several bases by reference to which this claim should be struck out: it is not pleaded; it is out of time; it has no reasonable prospects of success; the claimant is in breach of the Tribunal's orders made at the March Hearing requiring her to state what was discriminatory about the dress code. At the second part of this hearing she added that now that the claimant had particularised the basis of this complaint of indirect sex discrimination, it was clear that it was misconceived. As I have recorded above, she submitted that the claimant was not saying that the respondent's dress code policy places women at a disadvantage or that women find it difficult comply with it. She added that in saying that "she was treated less favourably", the claimant had used language that was relevant to a claim of direct sex discrimination.

63. As to the claim not been pleaded, I agree that there is no mention of indirect sex discrimination in either the claimant's original claim form or in the amended claim form that she submitted under cover of her email of 4 July 2023. I acknowledge that in both versions of her claim form the claimant refers to "discrimination" but there is nothing to suggest that that is a reference to indirect discrimination as defined in section 19 of the 2010 Act. Moreover, in the amended claim form (the content of which the claimant had time to consider carefully) she states as follows: "The Claimant affirms her intention to pursue the following claims: 1. Sex Discrimination: 1.1 Sex Harassment section 26(2) Equality Act 2010 1.2 Harassment section 26(1)
Equality Act 2010 1.3 Direct Sex Discrimination section 13 Equality Act 1.4 Victimisation section 27 Equality Act 201022 2.1 Unlawful deductions from wages Section13 Employment Rights Act 201022 3.1 Breach of contract". Although there are some errors in the statutory references that the claimant has

made it is clear that she has not made any reference to pursuing a complaint of indirect sex discrimination.

64. Additionally in this respect, neither has the claimant sought permission to amend her claim to add such a complaint of indirect sex discrimination. I again acknowledge that in her application to amend the claimant has made references to "discrimination" but, once more, there is nothing to suggest that those references relate to indirect discrimination as defined in section 19 of the 2010 Act.

65. There remains the further document that the claimant attached to her email of 4 July 2023 (referred to above as, "Claimant Chronology"). I accept that on page 5 of that document the claimant states, "The Claimant experienced indirect discrimination on 15 June, as she was treated less favourably due to a conversation being overheard by male colleagues about her outfit. Despite wearing a double-lined shirt-dress, which does not violate the dress code policy, The Claimant was sent home after this conversation took place on the sales floor. Despite voicing objections and expressing that she felt objectified in the workplace she was still instructed to leave." Thus, while in this document there is indeed an express reference "indirect discrimination" I agree with the submissions of Ms Dobbie in this respect. First, even allowing that the claimant relies upon the respondent's dress code as the provision, criterion or practice that it applies (which she has not expressly stated), she has not addressed the other elements contained in section 19 of 2010 Act of in what way the dress code places women at a particular disadvantage when compared with men and in what way it put the claimant at that disadvantage. Secondly, in stating that "she was treated less favourably", the claimant seems to be suggesting a complaint of direct rather than indirect sex discrimination.

66. In short, I am not satisfied that there is any part of the claimant's claim that could be subject to striking out pursuant to rule 37 of the Rules. For completeness, however, I record that in the above circumstances the claimant may not pursue a complaint of indirect sex discrimination.

Monetary claims

67. As recorded in the Submission section of these Reasons, the respondent has submitted that there are several bases by reference to which this claim should be struck out.

68. The claimant's contract of employment (3) contains various provisions that are relevant to these claims:

    68.1 Clause 9.1 of that contract (10) provides that the respondent "may, in its absolute discretion, pay you a bonus …. subject to such conditions as it may in its absolute discretion determine ….".

    68.2 Clause 9.3 (10) states, "Notwithstanding clauses 9.1 and 9.2, you shall have no right to a bonus or a pro-rata proportion of the same if your Appointment is terminated (howsoever arising)".

68.3 Clause 16.1 (13) makes provision for termination of employment by making a payment in lieu of notice which it is stated "will be equal to the pro-rata basic salary" and that for the avoidance of doubt it shall not include any element in relation to, "any bonus or commission payments that might otherwise have been due during the period for which the Payment in Lieu is made".

69. The respondent's commission scheme is also of relevance. Clause 9 (87) provides, amongst other things, that if the employment of an employee who participates in the scheme is terminated, the employee "shall have no right to receive any commission payments accrued, due or otherwise, save in the DBS' absolute discretion." I note that that provision is replicated in the updated plan that I was provided with after the first part of this hearing [90].

70. I acknowledge that in certain circumstances a bonus described as being discretionary can actually be contractual: see, for example, Horkulak v Cantor Fitzgerald International [2005] ICR 402, CA. Additionally, even if the bonus scheme is discretionary the employer's exercise of its discretion is not unfettered but is constrained by the operation of an implied contractual term that the employer will not exercise its discretion irrationally or perversely: see, for example, Clark v Nomura International plc [2000] IRLR 766, QBD. There are other key points in the above provisions, however, which go beyond the issue of discretion. These are as follows:

70.1 It is a term of the agreed contract of employment that the employee will have no right to a bonus, "if your Appointment is terminated (howsoever arising)".

70.2 The commission scheme similarly provides that the employee will have no right to receive any commission payments if his or her employment "is terminated".

71. In this connection, I also note that in her final submission at the end of the second part of this hearing the claimant contended, "this commission plan is not mine". She did so by referring to the definition of the Annual Quantity Amount as being "the total annual energy consumption by a customer" and stated that she was not an energy consultant but was employed to deal with water enquiries and arrange water contracts. Although the claimant stated at the first part of this hearing that the commission plan before that hearing was not up-to-date, she did not make this point about the plan not relating to her and only being in respect of energy consultants. Further, that document was signed by the claimant (albeit it appears that it could be an electronic signature) on 7 May 2021 [23], which the claimant did not challenge. In these circumstances, I am satisfied that the relevant wording of the commission plan in respect of employees losing the right to receive commission payments if their employment is terminated or notice of termination is given does apply to the claimant.

72. Given the above provisions I accept Ms Dobbie's submission that the monetary sums claimed by the claimant are not contractually due to her.

73. In these circumstances, I again apply the two-stage approach in Dolby having once more considered everything that is before me in terms of both documents and submissions and reminded myself of relevant caselaw.

    73.1 I am first satisfied that these monetary claims have no reasonable prospects of success and, therefore, that the grounds for strike-out contained in rule 37(a) of the Rules apply.

    73.2 I then considered whether I should exercise my discretion to strike out these claims (again including considering whether there are alternatives to striking out that might pursued such as the making of a deposit order) and, having done so, I have decided that in all the circumstances and for the reasons outlined above, it is appropriate that I should exercise my discretion to strike out these claims of the claimant.

74. Having done so, I am satisfied that it is right and proportionate that the claimant's monetary claims should be struck out. I therefore strike out that part of the claimant's claim that the respondent made an unauthorised deduction from her wages and/or was in breach of contract in not paying to the claimant the monies that she contends were due to her under both the respondent's bonus scheme and its commission scheme.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 4 December 2023

Notes

Video hearing

This was a remote hearing, which had not been objected to by the parties. Subject to the point made above regarding the claimant's attendance at the first part of the hearing by telephone, it was conducted by way of the Cloud Video Platform as it was not practicable to convene a face-to-face hearing, no one had requested such a hearing and all the issues could be dealt with by video conference.

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